

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

February 19, 1997

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-1260-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

THOMAS WILLIAM KOEPPEN,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Waukesha County: FREDERICK P. KESSLER, Reserve Judge.¹ *Affirmed.*

NETTESHEIM, J. Thomas William Koeppen appeals pro se from a judgment of conviction for violating a condition of bond pursuant to § 946.49(1)(a), STATS. Koeppen contends that the bond which constituted the basis for the charge was of no legal effect. Thus, he reasons that he could not have legally committed the offense. Koeppen raised this issue via a *Franks v.*

¹ Reserve Judge Frederick P. Kessler presided at the bench trial in this case. However, the substantive ruling which we review on appeal was made by the Honorable J. Mac Davis.

*Delaware*² motion. We uphold the trial court's ruling rejecting Koeppen's *Franks* motion. We therefore affirm the judgment.

We first begin with an observation about the state of the appellate record in this case. The ruling which inspires this appeal was made by the Honorable J. Mac Davis. However, the resolution of this case turns more on the proceedings in a prior criminal case against Koeppen prosecuted before the Honorable Lee S. Dreyfus, Jr. Koeppen produced the court file in the Judge Dreyfus case at the *Franks* hearing in this case. However, Koeppen has failed to include that material in the appellate record.

The State has included certain transcript excerpts from the proceedings before Judge Dreyfus in the appendix to its respondent's brief. While an appendix is technically limited to those materials which are part of the appellate record, *see* RULE 809.19(2), STATS., Koeppen does not object to the State's inclusion of these materials. Nor does he contend that the excerpts are inaccurate.

Therefore, our analysis of the proceedings before Judge Dreyfus will be based upon the parties' representations of those proceedings at the *Franks* hearing in this case and upon the limited excerpts from the proceedings

² *Franks v. Delaware*, 438 U.S. 154 (1978), holds that where a defendant makes a substantial preliminary showing that the state has knowingly and intentionally, or with reckless disregard for the truth, alleged a false statement necessary to a finding of probable cause, the defendant is entitled to a hearing on that claim. *See id.* at 155-56. If the defendant prevails on that claim at the hearing, the defendant is then entitled to a further determination whether probable cause exists without considering the improper information. *See id.*; *see also State v. Mann*, 123 Wis.2d 375, 378, 367 N.W.2d 209, 210 (1985).

before Judge Dreyfus. To the extent that our analysis of those proceedings may not be in keeping with what actually occurred before Judge Dreyfus, the fault is Koeppen's, not ours, since Koeppen has failed to assure that material presented to Judge Davis is included in the appellate record. *See* RULE 809.15, STATS.

FACTS AND PROCEDURAL HISTORY

We begin with the proceedings before Judge Dreyfus. In November 1993, following a jury trial, Koeppen was convicted as a repeat offender of disorderly conduct and bail jumping. Judge Dreyfus sentenced Koeppen to consecutive sentences of ninety days and nine months. Judge Dreyfus stayed these sentences and ordered Koeppen to serve three years probation. However, Judge Dreyfus further ordered that the probation term be consecutive to a sentence previously imposed by the Honorable Joseph Wimmer. Koeppen was scheduled to begin serving Judge Wimmer's sentence the following day. In summary, the entire effect of Judge Dreyfus's sentence was deferred until Koeppen had completed the sentence previously imposed by Judge Wimmer.

Later, the State learned that Koeppen had taken an appeal from the judgment entered by Judge Wimmer. Thus, Koeppen was not required to immediately serve that sentence pursuant to § 969.01(2)(b), STATS., which entitles a convicted misdemeanant to release pending appeal.³ Recognizing that Judge Dreyfus had imposed his sentence under the belief that Koeppen would

³ It is not clear from the record in this case whether this appeal was already taken at the time of the sentencing before Judge Dreyfus or whether the appeal was taken later.

immediately commence serving the sentence imposed by Judge Wimmer, the State brought a motion to modify the sentence imposed by Judge Dreyfus. The State's motion is not part of the appellate record. However, it appears from the arguments at the *Franks* hearing that the State asked Judge Dreyfus to eliminate the provision which made Koeppen's probation consecutive to Judge Wimmer's sentence.

Judge Dreyfus conducted a hearing on the State's motion on January 5, 1994. After learning of the appeal in Judge Wimmer's case, Judge Dreyfus saw the issue as whether this new development warranted a change as to when Koeppen's probation should commence. Judge Dreyfus chose not to rule immediately on the question. He continued the matter to the following month and, in addition, ordered Koeppen to sign an appearance bond which included certain conditions. These conditions included a provision that Koeppen was not to engage in any violent conduct against his wife or children. Koeppen did not object to the bond and, in fact, he executed it. It is this bond which lies at the heart of the conviction in this case.

By the time of the adjourned hearing on February 17, 1994, Koeppen had filed a notice of intent to pursue postconviction relief *in the case before Judge Dreyfus* and Judge Dreyfus took note of this filing. See RULE 809.40, STATS. As to the merits of the State's motion, Judge Dreyfus noted that his original sentence had been premised on the belief that Koeppen would immediately begin serving the sentence imposed by Judge Wimmer. Since the premise for the sentence had proven inaccurate, Judge Dreyfus ordered that

Koeppen immediately commence the probation. However, Judge Dreyfus did not alter the provision in the original sentence that the jail sentences against Koeppen were stayed. The matter of the bond was not addressed at this hearing.

That brings us to the present case. In January 1995, the State charged Koeppen with violating a condition of the bond in the Judge Dreyfus case. Specifically, the complaint alleged that Koeppen had physically abused his wife and child contrary to the conditions of the bond.

Koeppen filed a *Franks* motion, contending that the bond ordered by Judge Dreyfus was of no legal effect. Koeppen argued that he could not be simultaneously subjected to both probation and the conditions of a bond. Judge Davis denied the motion. The matter proceeded to a court trial before Reserve Judge Frederick P. Kessler who found Koeppen guilty of violating the bond condition. Koeppen appeals.

ANALYSIS

The controlling issue is whether the bond ordered by Judge Dreyfus was valid. As noted, Koeppen contends that he could not be simultaneously subjected to the restrictions of probation and a bond. In support he cites *State v. Braun*, 100 Wis.2d 77, 301 N.W.2d 180 (1981). There, after sentencing, the court stayed the sentence for a brief period and continued the bond previously in effect. The defendant escaped and the state sought to collect

on the bond. The supreme court held that the bond was of no legal effect after the sentencing. See *id.* at 83, 301 N.W.2d at 183.⁴

This case, however, is not a *Braun* case. Here, Koeppen had filed a notice of intent to pursue postconviction relief by the time of the February 17 hearing when Judge Dreyfus revisited the sentencing question. Pursuant to *State v. Firkus*, 119 Wis.2d 154, 350 N.W.2d 82 (1984), that process triggered Koeppen's right to release pending appeal pursuant to § 969.01(2)(b), STATS. *Firkus* holds that a convicted misdemeanor's right to release pending appeal is not dependent on the filing of a notice of appeal. See *Firkus*, 119 Wis.2d at 156, 350 N.W.2d at 83. Instead, the supreme court held that the defendant's application to the public defender for representation and the trial court's knowledge of such fact triggered the right to release pending appeal. See *id.* Here, we deem Koeppen's filing of the notice of intent to pursue postconviction relief as the functional equivalent of asking for public defender assistance. Judge Dreyfus obviously knew of this filing since he alluded to it at the February hearing.

The entitlement to bail pending appeal entitles a convicted misdemeanor to "release." See § 969.01(1) & (2)(b), STATS. The purpose of the statute is to protect the liberty interests of a convicted misdemeanor who, in most cases, will have already served the jail term before the appellate process can be completed. See *Firkus*, 119 Wis.2d at 162, 350 N.W.2d at 86. However,

⁴ The supreme court in *State v. Braun*, 100 Wis.2d 77, 301 N.W.2d 180 (1981), was construing § 969.09(1), STATS., 1977.

the statute speaks only to “release,” not to probation. Thus, the entitlement to release pending appeal does not extend to the probation component of a judgment of conviction in a misdemeanor case. Therefore, we see no inconsistency in Koeppen's simultaneous status as a convicted misdemeanant on probation on the one hand and as an appellant misdemeanant subject to a bond pending appeal on the other.

We acknowledge that Judge Dreyfus's imposition of the bond at the January 5 hearing might well have been improvident since Koeppen had not, as yet, filed a notice of intent to pursue postconviction relief.⁵ However, we hold that the bond was nonetheless valid after the February 17 hearing because of Koeppen's intervening notice of intent to pursue postconviction relief.

We also conclude that Judge Dreyfus was not precluded from ordering the bond because the jail sentences against Koeppen were already stayed. If Koeppen violated a condition of probation pending appeal, he could face the revocation of his probation—an event which, absent the bond, would require Koeppen to serve the sentences imposed by Judge Dreyfus. The bond assured that Koeppen would not be required to serve the jail sentence until his

⁵ It may also be, however, that Judge Dreyfus considered this case to be back in a presentence posture. Judge Dreyfus noted at this hearing that it was not his intent that Koeppen's probation be held in indefinite abeyance and to leave Koeppen in a position in which there were no controls on his behavior. As such, Judge Dreyfus adjourned the hearing and directed the parties to be prepared at the adjourned hearing to address the matter of further sentencing. If that was the judge's mind-set, then the bond was a preconviction bond. *See* § 969.01(1), STATS.

appeal was completed. As we have noted, that is the very purpose of the statute allowing release pending appeal.

Koeppen also contends that the bond and its attendant conditions did not serve the purposes of release pending appeal. He relies on § 969.09(2), STATS., which mandates certain conditions of bond which assure, inter alia, that the defendant will prosecute the appeal and will make all required future appearances.

Koeppen overlooks, however, that § 969.01(2), STATS., also *permits* the trial court to impose additional conditions of probation as set out in § 969.02, STATS. These include, inter alia, at subsec. (3)(d) “any nonmonetary condition deemed reasonably necessary to protect a member of the community from serious bodily harm or prevent intimidation of witnesses” The condition ordering Koeppen to refrain from any violent contact with his wife and family clearly qualifies under this statutory provision.

These statutes stand in total harmony with each other. Section 969.09(2), STATS., *mandates* certain conditions of release pending appeal. Sections 969.01(2)(a) and 969.02, STATS., permit certain additional *discretionary* conditions of release which the trial court deems appropriate.

CONCLUSION

We hold that the bond ordered by Judge Dreyfus was valid. As such, Koeppen's later conduct in violation of the conditions of the bond

constituted a proper basis for the charge in this case. Judge Davis correctly rejected Koeppen's *Franks* motion.

By the Court. — Judgment affirmed.

This opinion will not be published. See RULE 809.23(1)(b)4, STATS.